Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 845

YOGURT MASTER, INC.,
Petitioner,

versus

ARTHUR J. GOLDBERG, Secretary of Labor UNITED STATES DEPARTMENT OF LABOR (W. Willard Wirtz, Secretary of Labor, United States Department of Labor, substituted as party Appellee in place and stead of Arthur J. Goldberg, resigned),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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YOGURT MASTER, INC.,

Petitioner,

versus

ARTHUR J. GOLDBERG, Secretary of Labor UNITED STATES DEPARTMENT OF LABOR (W. Willard Wirtz, Secretary of Labor, United States Department of Labor, substituted as party Appellee in place and stead of Arthur J. Goldberg, resigned),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

OPINIONS BELOW.

This is a Petition seeking a review of the decision rendered in the case of YOGURT MASTER, INC., Appellant, versus ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor (W. Willard Wirtz, Secretary of Labor, substituted as party Appellee in place and stead of Arthur J. Goldberg, resigned), Appellee, as found in the Official Reporter Volume 310 Federal 2nd, page 53. A copy of said

opinion is appended to this Petition as provided by the rules of this Court.

The decision of the United States District Court for the Southern District of Florida was rendered on September 28, 1961, a copy of which is appended to this Petition, and the judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision was entered on November 21, 1962.

JURISDICTION.

The Supreme Court of the United States has jurisdiction to review the decisions entered in the above-styled cases in that the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been settled by this Court. This jurisdiction is statutorily conferred by 28 U.S.C.A. 1254 (1).

QUESTION PRESENTED.

What Constitutes "First Processing" As Used In Section 7(c) Of The Fair Labor Standards Act Of 1938, As Amended?

STATUTE INVOLVED.

Section 7(a) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 207(a), provides:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production

of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 7(c) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 207 (c), provides:

"In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed; or in the processing of sugar beets, sugarbeet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this section shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

STATEMENT OF THE CASE.

This is an injunction action initiated by the Secretary of Labor against the petitioner, a manufacturer of dairy products. It arises under the Fair Labor Standards Act, as amended (29 USC Section 201, et seq.), and is based on a claim that the petitioner was required to comply with the overtime compensation provisions of that Act [Section 7(a), 29 U.S.C. Section 207 (a)]. It is undisputed that the petitioner did not comply. The petitioner has pleaded and relied entirely on the first processing exemption [Section 7(c)] of the Act. This exemption stated:

> "In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products . . . the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged."

The dairy products which the petitioner processes are yogurt and sour cream. The issue presented in this case then is whether the making of these products is the first processing of milk, skimmed milk, or cream into dairy products within the meaning of the exemption.

The ingredients of the sour cream produced by the petitioner are:

> 44% fresh cream (40% butterfat), 15% fresh skim milk (36% nonfat solids), and 41% water (R. 20).

The ingredients of the yogurt are:

> 6½% fresh cream (40% butterfat), 25% fresh skim milk (36% nonfat solids), and 68½% water (R. 21).

The Secretary of Labor contends that the skim milk used by the petitioner already has been "first processed" before its use by the petitioner. This contention is based on the fact that the skim milk had its water content partially removed before the petitioner received it, thereby concentrating it to 36% non-fat solids. Therefore, on this narrow thread, the Secretary of Labor concludes that the processing by the petitioner of the skim milk and the other ingredients into what are undisputably dairy products is not *first* processing within the meaning of the exemption, but rather, *second* processing, in that one of the ingredients (skim milk) already has been *first* processed.

Skim milk (36% non-fat solids) is concentrated by heating it to a predetermined temperature to remove the water content (R. 19, 79-80). This is done to facilitate handling and transportation (R. 58) and to standardize the non-fat solid content, an absolute prerequisite to utilization of the milk. The percentage of non-fat solids in unstabilized skim milk will fluctuate according to the season of the year and the breed of cattle producing the milk (R. 26). This *mechanical procedure* does not change the chemical composition of the skim milk in any way (R. 22-23, 57-58), but merely removes a portion of the water content from the raw skim milk (R. 23, 58, 79-80). Absolutely no

foreign ingredients are added to the skim milk (R. 23, 58).

Prior to the use of the condensed skim milk in making yogurt and sour cream, the petitioner adds back the water removed (R. 58), thereby returning the skim milk to its exact original state (R. 22-23, 58).

The condensed skim milk is an entirely different product from the condensed milk one would purchase at a retail market (R. 41). One important difference is worthy of note: the condensed skim milk in question is *highly perishable* (R. 22, 41), even more so than fresh milk or cream (R. 41).

In its processing of cream and skim milk into yogurt and sour cream the petitioner uses no ingredients foreign to the dairy commodities enumerated in the exemption (R. 22, 27, 51, 76). It is, therefore, undisputed that the products produced are dairy products in the sense that this term is used in the statute (R. 27, 51).

ARGUMENT.

In *Mitchell v. Oregon Frozen Foods Company*, 254 F.2d 116 (CCA 9th Cir. 1958); rehearing den. 264 F.2d 599 (CCA 9th Cir. 1958); cert. granted 359 U.S. 958; cert. dismissed 361 U.S. 231, a similar question was presented to the Court. Certiorari was granted, but was subsequently dismissed after oral argument as having been improvidently granted in view of the

ambiguities in the record as to the issues sought to be tendered.

In the present case, the question is again presented to the Court and the issue is clear cut. The record is without ambiguity.

It is worthy of note that in *Mitchell v. Oregon Frozen Foods Company, supra,* that the defendant was engaged in the packaging of frozen foods. The defendant received corn and carrots, in their raw and natural state, blanched them by a steaming process, then froze them in bulk, and stored them. Later, the defendant re-sorted the frozen vegetables and re-packaged them in consumer sized packages.

In holding the prior operations of steam blanching and freezing not to be "first processing" within the meaning of Section 7(c), and thereby including the re-packaging operation within the exemption, the Court said:

> "First processing should not apply to picking, gathering, digging of vegetables or fruits. It certainly is absurd to say it is accomplished by storing as appellant seems to urge. It would be likewise a perversion to say that 'storing' in a cool place was processing. If the cold be *mechanically applied,* no difference is apparent. If the temperature be artificially created so that the product is frozen, still no processing has been accomplished. *No significant change has taken place* . . . Neither freezing nor subjection to steam is

processing in common acceptance of the term or in trade usage." (Emphasis added.) 264 F.2d 599, 601.

That the question should be resolved by this Court is shown by the lengthy struggle of the courts with this very issue. In *Hendricks v. DiGiorgio Fruit Corporation,* 49 F.Supp. 573 (USDC ND Calif., SD, 1943), one of the earlier cases involving the interpretation and application of the phrase "first processing" as used in Section 7(c), the Court found that the exemptions provided for by Sections 7(c) and 7(b)(3) of the Act had been properly taken and that the plaintiff was not entitled to overtime payment. However, more important than the decision is the language of the Court:

> *"If 'first processing' does not mean the processing that first results in a marketable product, where is the line to be drawn?* It is true that the wine or brandy making process may be broken down into component processes or operations, and that these, in turn, may be broken down still further. But the same thing is true of any other process . . . Obviously, first processing does not end at some arbitrarily chosen point in the midst of the wine or brandy making process, any more than it ends at such a point in the cheese making process. * * * *To choose one of the early steps in such continuous process and say this and no more constitutes first processing would be arbitrary and unwarranted."* (Emphasis added) 49 F.Supp. at 575, 576.

In the *Oregon Frozen Foods* case, the District Court made the following observation on the meaning of "first processing":

> "It would appear that 'first processing' is completed when the products are packaged in consumer size packages *even though delayed*. When they are so packaged, there is a *finished product for market* and the first process is completed." (Emphasis added.) *Mitchell v. Oregon Frozen Foods Company*, 145 F.Supp. at 163 (D.C. Ore., 1956).

In the instant case, *only heat is mechanically applied* to the skim milk. There is no practical difference in *removing the heat* from a product, as was done in *Oregon Frozen Foods*, and removing the water from the product by *adding heat*—both accomplished by a mechanical application for the limited purpose of storage in one case and transportation in another. Furthermore, in *Oregon Frozen Foods*, the vegetables were no longer in a perishable state after the steaming and freezing operation was performed; whereas, here, the skim milk, after it is condensed, is in a *highly perishable state* (R. 22, 41). In this connection, see 29 CFR Supp. Dec. 31, 1952, par. 780.51(b)(1) and (b)(3), quoting from Release R-1892, Secretary of Labor and the Administrator of the Wage and Hour and Public Contracts Division:

> "An employer who commences processing operations on a perishable commodity to which the exemption in Section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including byproduct operations,

which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities *remain perishable.*

"* * * For example, where peas are shelled (vined) or green beans are trimmed and cut into pieces in one establishment, and the raw peas or beans sent to another establishment for freezing, *the exemption can apply to the freezing operations in the second establishment as well as to the operations in the first establishment.*" (Emphasis added.)

Note that Release 1892 would exempt the process whereby the temperature of the item is mechanically altered—in this instance, the removal of heat.

In *McComb v. Hunt Foods, Inc.*, 167 F.2d 905 (CCA 9th Cir. 1948), the issue was whether further processing of perishable apple cores and peels purchased from another plant in which the pulp of the apple was removed was "first processing", within the meaning of Section 7(c). In holding that such further processing was "first processing" in that it was necessary to convert the apple into a non-perishable salable product, the Court said:

> "So long as the fresh fruit . . . has not been converted to a *non-perishable* form . . . the 'first processing' of which the statute speaks has not been ended." (Emphasis added.)

There is no practical difference between the mechanical removal of the pulp of the apple from the whole

apple and the mechanical removal of water from the whole skim milk. In fact, the removal of the pulp from the apple could be said to change the identity of the apple (leaving only cores and peels); whereas, the partial removal of the water content of the skim milk does not change the basic identity of the skim milk—a named commodity in the exemption. Therefore, if the processing of apple cores and peels purchased from another establishment is "first processing" on the grounds that the cores and peels are in perishable form, can it be said that processing of condensed skim milk, which is in perishable form, is not first processing within the meaning of Section 7(c)?

Interpretative Bulletin 780, recently issued (October, 1961) by the Wage-Hour Administrator, states, in part:

> "Edible portions of fresh fruits or vegetables are considered to be fresh fruits or vegetables for the purposes of Section 7(c) [and therefore *not* subjected to 'first processing'] even though they have been subjected to an operation such as peeling, shelling, coring, or slicing so long as the whole fruit or vegetable or any severed parts thereof remain raw and *perishable* and recognized in the common understanding as fresh fruits or vegetables."

What differentiation can be made between the mechanical operations of peeling, shelling, coring or slicing performed on fresh, perishable fruits or vegetables and the mechanical operation of drying fresh perishable skim milk? The Administrator, himself, admits in the above bulletin that mechanical operations per-

formed on named commodities in Section 7(c) are not first processing, so long as the commodities remain fresh and perishable, the condition of the condensed skim milk received by the petitioner.

The Administrator goes on to say, in the same bulletin, that the shelling of corn constitutes preparing fresh vegetables in their raw and natural state and does not constitute "first processing" under Section 7(c). Corn, as defined by the Administrator in this bulletin,

> "is corn such as is used for feed, seed and industrial uses, the kernels of which are in the hard *dry state,* as distinguished from corn harvested as a perishable fresh vegetable while the kernels are soft."

This ruling removes all doubt that the Wage-Hour Administrator has determined that the first processing exemption of Section 7(c) applies to the processing of commodities *with the water content removed,* even if the commodity does *not* remain fresh and perishable after the water is removed.

The partial removal of the water content from a *named* commodity in the exemption, which leaves that commodity in a fresh and perishable condition, does not constitute first processing. The removal of the water does not make further processing into dairy products second or subsequent processing.

The condensed skim milk used by the petitioner in processing yogurt and sour cream is a raw material

used as an ingredient in a marketable dairy product. The skim milk has been condensed, for ease of handling alone, and the water previously removed is added back to the milk before petitioner uses it in processing his dairy products. The skim milk is not marketable in its condensed form in that it is highly perishable and can be used *only* as a raw material for processing of *marketable* dairy products, such as yogurt and sour cream.

In *Sugar Creek Creamery v. Walker*, 187 S.W. 2d 178 (Ark. 1945), milk and cream were received at a plant, subjected to a "flash" pasteurization process, and then subsequently processed into cheese and butter. The Court held the first processing of the milk and cream did *not* end with the pasteurization, even though occasionally this milk and cream was sold to dairies after the pasteurization process. In so holding, the Court said:

> "It was shown that 'flash' pasteurization was sufficient pasteurization of the raw products if it was to be manufactured into butter or cheese but that a different kind of pasteurization would be customary or required in the treatment of milk for commercial sale as pasteurized milk by a dairy."

This is the case before the Court. The skim milk would have to be further processed, or, at least, subjected to a different type of processing in order to render it marketable for commercial sale as condensed skim milk.

The necessity of the product's being in marketable form at the completion of the first processing operation is also brought out by the court in *Hunt Foods*, in saying the apples must be converted "into a non-perishable saleable product" by the first processing operation. See

also *McComb v. C. H. Musselman Company*, 75 F.Supp. 185, 167 F.2d 918 (1948).

Therefore, while the legal definition of "first processing" within the meaning of Section 7(c) is not without its twilight zones, one thing remains clear—"first processing" does not end until the commodity is put into marketable form for commercial sale on the consumer market.

The basis of Respondent's contention that Petitioner is not engaged in "first processing" rests solely on the claim that the skim milk has been "first processed" prior to its use by petitioner. Assuming the skim milk has been processed, nevertheless petitioner is engaged in the "first processing" of skim milk and cream into dairy products within the full meaning of the Act.

Implicit in the Congressional debates is the concern of the legislators that processors of perishable foodstuffs not be penalized by overtime payments because of the necessity for speedy processing of perishable commodities into a non-perishable salable state.

One of the first legislative discussions of the Act in 1937 evidences the concern of the legislators for the exemption of processors of perishable foodstuffs:

> "Mr. Tydings:
>
> My reading of the bill leads me to believe that it is the intention of the bill that where a bona fide case is made out for putting up *perishable* goods, whether they be products of the orchards, or the farm, or the fishery or what not, the maximum hour provision shall not apply where food otherwise would be lost if it did apply.

"Mr. Black:

The senator is absolutely correct. (Emphasis added.) 81 Cong. Rec. 7652.[1]

As the debates over the Act progressed, the lawmakers expressed their concern for processors of perishable commodities:

"Mr. Whittington:

If agriculture is to be exempt, surely industries engaged in producing, distributing and handling *dairy products*, poultry products, livestock products and other agricultural commodities should be exempt . . . . The products in many cases are perishable." (Emphasis added.) 82 Cong. Rec. 1786.

As specific refinements of the Act were worked out, questions arose concerning the breadth of the "first processing" exemption as it now stands under Section 7(c). In response to such a question, Mr. Boileau, a strong supporter of the bill, answered as follows:

"I submit that all that is needed for the preservation and protection of *perishable commodities* is contained in the amendment." [Exemption of those engaged in the first processing of dairy commodities into dairy products.] (Emphasis added.) 83 Cong. Rec. 7405.

Another staunch supporter, Mr. Beiter, expressed the following opinion:

"Mr. Culkin:

Does the gentleman believe first processing of dairy products would include casein and dried milk?

[1] See also House Report 1452, 75th Cong. 1st Session; Public Act 846, Sec. 9, "nor shall this Act apply to *perishables* including dairy, livestock and nursery products." (Emphasis added.)

"Mr. Beiter:
Yes, I believe it would." 83 Cong. Rec. 7407.

Certainly, if "first processing" was meant to include the processing of dried milk, it was also meant to include the processing of perishable condensed skim milk.

A question arose as to the limitation of the exemption by the placing of the word "first" before "processing". Mr. Boileau, in pointing out that the exemption was only from the overtime provision, adequately answered this question:

> "It will permit reasonable treatment of *perishable* commodities only on the hours provisions." (Emphasis added.) 83 Cong. Rec. 7422.

He went on to explain why the exemption had been limited to "first" processing: textile mills and shoe factories could be construed to be engaged in the "processing" of agricultural commodities. Therefore, Mr. Boileau's explanation, coupled with the repeated expressions that processors of perishable commodities are exempt from the overtime provisions clearly indicates that "first processing" applies to the processing of *perishable* commodities vis-a-vis leather and cotton. *A fortiori* petitioner's operation comes within the full meaning of the exemption as being engaged in the processing of perishable raw materials into dairy products.

There are absolutely no foreign ingredients added to the skim milk and cream in the process of making yogurt and sour cream (R. 93, 122-23, 124). Two leading cases disqualifying an employer from the "first process-

ing" exemption under Section 7(c) of the Act are distinguishable in that they were decided on the grounds that foreign ingredients were added, to the extent that the ultimate product was not a dairy product. *Walling v. Bridgeman-Russell Company*, 2 WH Cas. 785 (D.C. Minn. 1942) (ice cream mix); *Miller v. Litchfield Creamery Company*, 5 WH Cas. 1039 (D.C. N.D. Ind. 1944) (Milnut and Milnot). In the case before the Court, it is undisputed that a "dairy product" is the ultimate product of the employer. It was the processing of such products that the exemption intended to exclude from the overtime provisions of the Act.

The Respondent has heretofore taken the position that the contentions of the Petitioner are contrary to certain language contained in the Department of Labor's Interpretative Bulletin, Part 780.

Section 7(c) of the Fair Labor Standards Act is a complete statement of what the Congress intended in enacting the exemption. No authority has been delegated to the Administrator to define its terms or limit its operation.

Such definite authority is delegated to the Administrator under, for example, Section 13(a)(10) of the Act to define "areas of production". Under Section 13(a)(10) the scope of judicial review of his definition is to determine only if the Administrator exceeded his authority, not if the court would have defined an area of production in a similar manner. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

This is not the case with the Administrator's interpretation of Section 7(c). *Skidmore v. Swift & Co.*,

323 U.S. 134 (1944), makes it abundantly clear that interpretation of this and similar portions of the Act is the job of the courts, not the Administrator.

The status of a bulletin such as Interpretative Bulletin 780 is simply this: It is entitled to respect and consideration to the extent that its reasoning is valid and it is consistent with judicial authority. In short, the court should consider it in the light of all those factors which give it power to persuade, if lacking power to control. *Skidmore v. Swift & Co., supra.*

CONCLUSION.

It is respectfully submitted that the Judgment entered by the United States Court of Appeals for the Fifth Circuit affirming the Order of the District Court of the United States for the Southern District of Florida is erroneous and should be reversed.

WHEREFORE, your Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to review these Judgments and Orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this ..... day of February, 1963, caused a copy of the foregoing Petition to be furnished to the following individuals by depositing same in the U. S. Mail, air mail postage prepaid:

Solicitor General,
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Of Counsel.

APPENDIX "A".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19542.

YOGURT MASTER, INC.,
Appellant,

versus

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor (W. Willard Wirtz, Secretary of Labor, United States Department of Labor, substituted as party Appellee in place and stead of Arthur J. Goldberg, resigned[1],
Appellee.

Appeal from the United States District Court for the Southern District of Florida, at Tampa.

(November 21, 1962)

Before JONES and BELL, Circuit Judges and CARSWELL, District Judge.

BELL, Circuit Judge: This is an appeal from the entry of an injunction on the petition of the Secretary of Labor against a manufacturer of dairy products. The petition was based on an violation of §§ 15 (a) (1), 15 (a) (2) and 15 (a) (5) in that appellant failed to comply with the overtime compensation provisions of § 7, and failed to keep

[1] Substituted under Rule 25 (d), as amended, Fed. R. Civ. P.

adequate records of hours of work as required by § 11 (c) of the Fair Labor Standards Act, as amended. Title 29 USCA, §201 et seq. Jurisdiction was based on §17 of the Act.

It is undisputed that appellant did not comply and the sole issue before us, as stipulated, is whether the production of Yogurt and sour cream constitutes the first processing of skimmed milk into dairy products within the meaning of the exemption set out in § 7 (c) of the Act.[2]

Appellant processes or produces yogurt and sour cream from dairy products alone and an important ingredient

[2] § 7 (a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *

* * * * * *

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugarbeet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into sirup, the provision of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Secretary), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

in each is fresh skimmed milk. The skimmed milk used is processed in Wisconsin by partially removing its water content and thereby concentrating it from 9% non-fat solids to 36% non-fat solids. This concentration into what is known as condensed skimmed milk is accomplished by heating it to remove the water content, and is done to facilitate handling and transportation and to standardize the non-fat solid content. This process in no way changes the chemical composition of the milk and no foreign ingredients are added to the milk at any time. The skimmed milk is then sold by the processors in Wisconsin to a dairy in Florida, and in turn it is sold to appellant. Then appellant adds back the water removed, thereby returning the skimmed milk to its original state, before using it in making yogurt and sour cream.

The Secretary of Labor, taking the position that the first processing ended in Wisconsin, contends that the first processing exemption does not apply to appellant. He asserts that the processing by appellant is a second processing of the skimmed milk. Appellant, on the other hand argues that removing the water in Wisconsin and adding it back in Florida is all first or a continuous processing short of converting the skimmed milk into marketable products of yogurt and sour cream. The district court found that the fact of the processing in Wisconsin by other parties before appellant's production began defeated the claim of exemption. The holding was to the effect that the processing by appellant was not first, but a subsequent processing.

The exemption provisions of the Act are to be narrowly construed against the employer claiming under them

and the burden was on appellant to show application of the exemption to its operations. *Arnold v. Ben Kanowsky, Inc.*, 1960, 361 U. S. 388, 80 S. Ct. 453, 4 L. Ed. 2d 393; *Mitchell v. Kentucky Finance Company*, 1959, 359 U. S. 290, 295; 79 S. Ct. 756, 3 L. Ed. 2d 815; *Phillips, Inc. v. Walling*, 1945, 324 U. S. 490, 65 S. Ct. 807, 89 L. Ed. 1095; and *O'Meara-Sterling v. Mitchell*, 5 Cir., 1962, 299 F. 2d 401. It must be unmistakably clear that the exemption applies, and we must consider the holding of the district court in this light.

Appellant relies on *Mitchell v. Oregon Frozen Foods Company*, 9 Cir., 1958, 264 F. 2d 599, cert. den., 359 U. S. 958, and dismissed, 361 U. S. 231, a case involving the fruit and vegetable exemption as distinguished from the dairy products exemption. Footnote (2), *supra*. There the defendant purchased vegetables from farmers. They were then cleaned, sorted, steam blanched and frozen. All could not be put into consumer size packages at the time this was done because of the seasonal rush but as much of the crop as possible was packaged. The balance was put in large bulk containers, kept in cold storage to the end of the peak season, and then re-sorted and re-packaged in consumer size packages. The court held that all of this amounted to first processing. It is to be noted that this holding rested on the foundation of a decision to the same effect by the district court, and thus was buttressed by the clearly erroneous rule. D. C. D. Ore., 1956, 145 F. Supp. 157; and Rule 52 (a), Fed. R. Civ. P. The district court stated that first processing was completed when the products were packaged in consumer packages even though delayed, relying on

Hendricks v. DiGiorgio Fruit Corp., N. D. Cal., 1943, 49 F. Supp. 573. That case involved the continuous processing of fresh grapes into wine and brandy in one operation. See also *Sugar Creek Creamery Co. v. Walker*, Ark., 1945, 187 S. W. 2d 178 where the conversion of milk into cheddar cheese and cream into butter, all in the same plant, was held to be first processing, against the contention that the first processing ended with flash pasteurization. The court noted that the first process would end with pasteurization of raw milk for resale as such. Pasteurization, bottling and casing milk for resale was the activity in *Perwitz v. Irvindale Farms, Inc.*, Ga. Ct. App., 1949, 79 Ga. App. 181, 53 S. E. 2d 196, and the stacking of milk cases containing the bottled milk was held in such near proximity to the first processing, pasteurization, as to be a part of first processing.

Appellant also relies on the *McComb v. Hunt Foods, Inc.*, 9 Cir., 1948, 167 F. 2d 905, one judge dissenting. There the processing of perishable apple cores and peelings purchased from other plants was held to be first processing. The basis of the holding was that first processing was such as was necessary to convert the apple into a non-perishable product, and that the core and peelings which had not theretofore been processed also fell into this category. The separation mechanically of the core and peelings from the apple prior to sale was not looked upon as a first processing by the majority. This case was followed in *McComb v. C. H. Musselman Co.*, 3 Cir., 1948, 167 F. 2d 918.

The *Oregon Frozen Foods Company* case indicates that first processing is anything short of marketing while the

Hunt Foods case indicates that it is anything short of being converted into non-perishable form. Neither of these doctrines is controlling on the facts here presented.

The Secretary relies on *Walling v. Bridgeman-Russell Co.*, D. C., Minn., 1942 2 WH Cases 785. That case held the exemption inapplicable to employees engaged in manufacturing ice cream and ice cream mix because of the use of non-dairy ingredients, a question not here presented, and because of the use of dairy products already subjected to first processing. It was applied to employees engaged in the manufacture of butter. *Domenico v. Mitchell*, 10 Cir., 1956, 232 F. 2d 112, is also cited to show the inapplicability of the exemption, as it pertains to the first processing of perishable seasonal fresh fruits or vegetables, to the activities of a Denver vegetable wholesaler. The vegetables had been processed on farms some one hundred miles away by being sorted, graded, packed and shipped.[3] The wholesaler, who resold the vegetables, had his employees whose wages were in question open nineteen out of the twenty vegetable cars under consideration, remove vegetables from some, and add vegetables to others. The contents of eight of the cars were removed and sold locally while eleven of the cars were reshipped.

The rationale of *Domenico* is of equal force in the situation before us. Appellant purchased the skimmed milk for use as he needed it from a wholesaler in Florida.

[3] The court ruled that the wholesaler was entitled to a seasonal industry exemption under § 7 (b) (c) of the Act, an exemption not here involved.

It has been processed in Wisconsin before being shipped to Florida. The first processing ended, if not in Wisconsin, at least upon arrival in Florida. Appellant was not engaged in first processing by virtue of the work of the employees in question being a part of a continuous processing of skimmed milk that ended in yogurt and sour cream, or by being in reasonable proximity or relation to the first processing.

The district court found that their work was a subsequent processing of skimmed milk as distinguished from a first processing. That finding had adequate factual support in the record. Thus it is that no error appearing, the judgment of the district court should be and is

AFFIRMED.

APPENDIX "B".

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

YOGURT MASTER, INC.,
Defendant.

Civil Action No. 3870-Civ-T.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Filed Sept. 28, 1961.

This matter was tried by the Court without a jury at Tampa, Florida on June 26, 1961. Defendant appeared by its President, and both sides were represented by counsel. The Court, having heard and considered all the legal evidence and arguments of counsel, and being otherwise fully advised, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. The Secretary of Labor filed this action on June 20, 1960, and seeks thereby to enjoin defendant from violating the overtime, record-keeping and shipping provisions of the Fair Labor Standards Act of 1938, as

amended (29 U.S.C. 201, et sey.), hereinafter referred to as the Act.

2. The defendant, Yogurt Master, Inc., is, and at all times relevant to this action was, a corporation having a place of business and doing business at Griffin-Knight Station Road in Lakeland, Polk County, Florida, where it was and is engaged in the production, sale and distribution of various dairy products and by-products. Such products include cottage cheese, sour cream, buttermilk starter and yogurt.

3. During times relevant to this action, defendant's employees H. C. Snider, Mrs. Van Dora Snider, Bobby Middleton, Louis J. Spivey, Beman L. Shirkey, Lester Higgins and Milton Fletcher, regularly mixed, prepared, stored, packaged, handled and otherwise worked on defendant's goods or products or ingredients thereof, substantial portions of which were regularly shipped, delivered and sold by defendant to points outside the State of Florida.

4. The employees listed in Finding of Fact No. 3 regularly and frequently worked substantial numbers of hours in excess of forty (40) per workweek and were paid by defendant for all hours, without regard to their number, at their regular rates. They did not receive one and one-half times their regular rates of pay for hours worked in excess of forty (40) per workweek. These pay practices continued until the time of trial.

5. Defendant denied that its employees were engaged in commerce or in the production of goods for

commerce within the meaning of the Act. By way of further defense, Yogurt Master, Inc. contended that at all times material to this action the overtime pay requirements of Section 7 of the Act were not applicable to its employees, because it was engaged in the first processing of milk, buttermilk, whey, skim milk, or cream into dairy products. Section 7(c) of the Act provides in pertinent part that "In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products * * *, the provisions of subsection (a) [the overtime pay provision] shall not apply to his employees in any place of employment where he is so engaged; * * *"

The Defendant denies that the various dairy products and by-products produced by it included substantial quantities of ingredients which had been processed by parties other than defendant and at places other than defendant's establishment before its own production processes occurred. Whether or not the "first processing" exemption applies, is the principal issue of this case.

6. Defendant produced, for regular sale outside the State of Florida, yogurt and sour cream. In making yogurt the defendant used 6½% fresh cream (40% butter fat), 25% condensed skim milk (36% non-fat solids), and 68½% water. In making sour cream, the defendant used 44% fresh cream (40% butter fat), 15% condensed skim milk (36% non-fat solids), and 41% water. The condensed skim milk used by defend-

ant in these products was purchased by defendant from various sources, the principal one being a Tampa, Florida dairy products company. The latter company supplied defendant with condensed skim milk which came from Turtle Lake, Wisconsin. The 36% non-fat solids skim milk so purchased by defendant, and then used in its products, is a concentrated product produced by recognized dairy processes. This concentrated product was produced, before delivery to defendant, as follows: fresh whole milk was separated into cream and skim milk, the latter being comprised of approximately 9% non-fat solids following the separation. The skim milk was heated to a predetermined temperature, then went into a condensing pan, and there, by various temperature and pressure combinations, water was removed and it was condensed down to 36% non-fat solids, or a four-to-one concentration.

7. During the period from January, 1959, to June, 1959, defendant employed Carolyn Purdue in its office where she regularly typed and prepared correspondence sent to points outside the State of Florida and where she regularly performed many other office functions related to the defendant's interstate purchases and sales transactions. The defendant failed to keep accurate records of the daily and weekly hours worked by this employee and she was paid a straight weekly salary.

Conclusions of Law.

1. The Court has jurisdiction of the parties and of the subject matter of this action.

2. The employees named in Finding of Fact No. 3 were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. The burden of proving the overtime exemption claimed under Section 7(c) of the Act is upon the defendant, and the defendant has failed to sustain that burden. On the contrary, substantial portions of the ingredients used by defendant in its products had in fact been processed elsewhere by other parties, before defendant's production began, and this defeats the claim that defendant was engaged in first processing within the meaning of Section 7(c) of the Act. The exemption provisions of this statute are to be strictly construed, and the word "first" as used in this part of Section 7(c) of the Act means what it says: The employer must be engaged in the first, and not some subsequent, processing of the products named in the exemption.

4. The defendant failed to compensate its production employees in accordance with the overtime provisions of the Act.

5. The defendant violated the provisions of Section 15(a)(1) of the Act by shipping in interstate commerce goods in the production of which it employed persons in violation of the overtime provisions of Section 7(a) of the Act.

6. The defendant's office employee was engaged in commerce and in the production of goods for commerce within the meaning of the Act and the defendant's failure to keep adequate and accurate records of her hours of work as required by Section 11(c) of the Act, and the Regulations issued pursuant thereto, was therefore in violation of the Act and Regulations.

7. The plaintiff having proved his case, and defendant having failed to prove its claim to the exemption, plaintiff is entitled to the relief sought.

Dated this 26th day of September, 1961.

JOSEPH P. LIEB,
United States District Judge.

FINAL JUDGMENT.

Filed Sept. 28, 1961.

Pursuant to the findings of fact and conclusions of law made and entered by the Court in this cause, it is

ORDERED, ADJUDGED and DECREED that the defendant, Yogurt Master, Inc., its agents, servants, employees, attorneys, and all persons acting or claiming to act, in its behalf and interest be, and they hereby are, permanently enjoined from violating the provisions of Sections 15(a)(1), 15(a)(2) and 13(a)(5) of the Fair

Labor Standards Act of 1938, as amended, in any of the following respects:

(1) Defendant shall not, contrary to Sections 7 and 15(a)(2) of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, as defined by the Act, for a workweek longer than forty (40) hours unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

(2) Defendant shall not, contrary to Section 15(a)(5) of the Act, fail to make, keep and preserve adequate and accurate records of its employees, and the wages, hours and other conditions and practices of employment maintained by it as prescribed by existing regulations of the Administrator issued pursuant to Section 11(c) of the Act, and from time to time amended, and found in 29 CFR 516.

(3) Defendant shall not, contrary to Section 15(a)(1) of the Act, ship, deliver, transport, offer for transportation or sell in commerce, as defined by the Act, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in paragraph (1) of this Judgment.

It is further ORDERED, ADJUDGED and DECREED that the costs be, and they hereby are, taxed against the defendant, for which execution may issue.

Done this the 28th day of September, 1961.

JOSEPH P. LIEB,
United States District Judge.